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Supreme Court, U.S.
FILED
MAR 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

CASE #_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CHARLES WILLIAM O'BRIEN, Petitioner

v.

JACOB K. STEIN, and Paxton & Seasongood, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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P.O. Box 8369
Columbus, Ohio 43201
(614) 291-8787

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No._____

CHARLES WILLIAM O'BRIEN, Petitioner

v.

JACOB K. STEIN, et al., Respondent

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES SUPREME COURT

The petitioner, Charles William O'Brien, respectfully prays that a Petition for Certiorari issue to review the judgment and opinion of the State of Ohio Supreme Court entered in this proceeding on October 12, 1988 and reheard on December 14, 1988.

QUESTION PRESENTED FOR REVIEW

The single question presented for review is whether the granting of immunity to practicing attorneys for slanderous and malicious statements made during the course

of a legal proceeding against a pro se litigant is violative of the pro se litigant's rights under the 14th Amendment of the U.S. Constitution given that the pro se litigant is not equally protected from making such remarks.

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OPINIONS BELOW

The Order of the Ohio Supreme Court denying rehearing is set out in the Appendix, page 13 The Entry of the Ohio Supreme Court dismissing the Appeal is set out in the Appendix, pages, 14-15. The Journal Entry of Judgment of the Court of Appeals of Ohio affirming the trial court judgment is set out in the Appendix, page 16. The Decision of the Court of Appeals of Ohio affirming the trial court judgment is set out in the Appendix, pages 17-26. The Decision of the Franklin County Common Pleas Court, sustaining Defendants' Motion for Summary Judgment, is set out in the Appendix, pages 27-31.

JURISDICTION

The initial judgment of the Ohio State Supreme Court was journalized on October 12, 1988. The rehearing decision of the above judgment was journalized on December 14, 1988. This petition was filed within ninety (90) days of December 14, 1988. Accordingly, this Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution - 14th Amendment

> 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 2, 1987, Plaintiff-Appellant filed a Complaint for slander against Defendants-Appellees, indicating that

Defendants-Appellee's remarks before a Common Pleas Judge were untrue, unwarranted and made with specific intent to contaminate and corrupt pending judicial proceedings and ultimately deny Plaintiff-Appellant his rights to equal access to and treatment by the Trial Court.

On July 7, 1987, Defendants-Appellees filed their Answer and Motion for Summary Judgment. The Motion for Summary Judgment indicated that the allegations of the Complaint were "untrue", that whatever statements were made were done in a context "clearly" relevant to the judicial proceedings and that Defendants-Appellees had "absolute immunity" against Plaintiff-Appellant's claim, citing Surace v. Wuliger, (1986), 25 Ohio St. 3d 229, 233, (Surace), whereby statements made by an attorney in judicial proceedings are absolutely privileged if such statements bear some reasonable relation to the judicial proceeding in which they appear and, Justice

v. Mowery (1980), 69 Ohio App. 2d 75, 76, (Justice), whereby said statements were held immune if they "may possibly bear some relation to the judicial proceeding".

Thereafter, on August 11, 1987, Plaintiff-Appellant sought and received leave to file an Amended Complaint. Plaintiff-Appellant filed a Verified Complaint and subsequently sought discovery of Defendants-Appellees pursuant thereto and prior to the hearing on Defendants-Appellees' Motion for Summary Judgment. The Defendants-Appellees' Motion for Summary Judgment was set for a Non-Oral Hearing on September 11, 1987 at 9:00 a.m.

From August 11, 1987 until September 16, 1987, Plaintiff-Appellant sought discovery by Interrogatories and Deposition, pursuant to Ohio Civil Rule 56. These efforts were ignored by Defendants-Appellees, without moving for a Protective Order, until Plaintiff-Appellant noticed and subpoenaed

Defendant-Appellee Stein for a Deposition on August 26, 1987. On the very day before the Deposition was to occur, Defendants-Appellees filed an Application for a Protective Order and a Motion to Quash the Subpoena. Plaintiff did not receive notice of this Application until after Defendants-Appellees failed to appear. Meanwhile, the Trial Court did not grant said Defendants-Appellee's Motion or quash Plaintiff-Appellant's subpoena.

On August 28, 1987, Plaintiff-Appellant moved the Trial Court for an Order Compelling Discovery of Production of Documents and Answers to Interrogatories, citing the need for discovery to occur on or before the September 11, 1987 non-oral hearing date for Defendants-Appellees' Motion for Summary Judgment.

On August 31, 1987, Plaintiff-Appellant moved the Trial Court for an Order Extending Time to Respond to Defendants-Appellees' Motion for Summary Judgment, citing

Defendants-Appellees' refusal to provide discovery and Plaintiff-Appellant's rights thereto under Ohio Civil Rule 56.

On September 16, 1987, the Trial Court granted Defendants-Appellees' Motion for Summary Judgment while simultaneously overruling all of Plaintiff-Appellant's pending Motions without giving Plaintiff-Appellant an equal opportunity to respond, as provided by Ohio Civil Rule 56. The Trial Court decided that absolute immunity attached to any statements by Defendant-Appellee Stein if those statements bore any possible relationship to the proceedings, in spite of any malice or ill will, citing Justice, supra. The Trial Court acted - not on September 11, 1987, as scheduled, but on September 16, 1987, and without notice to Plaintiff-Appellant.

The Franklin County Court of Appeals heard oral arguments on January 31, 1988. During this time, one of the Appeals Judges incorrectly indicated that the reasonable

relationship of Mr. Stein's statement was the issue of the bond that would be common to all Temporary Restraining Order proceedings. Plaintiff-Appellant challenged the Judge's position on several occasions, indicating that Mr. Stein's defamatory statements were not mentioned at the Temporary Restraining Order hearing and that the mere fact that a bond was a requirement for the implementation of a Temporary Restraining Order did not automatically establish a prima facie reasonable relationship as required under Surace, supra

On April 28, 1988, the Franklin County Court of Appeals rendered its decision, upholding the Trial Court. The gist of the Appellate decision was that the Trial Court had the right to grant Summary Judgment as a matter of law, Mauk v. Brundage, (1903), 68 Ohio St. 89, irrespective of the crucial inquiry omitted by the Trial Court as to whether the alleged defamatory statement bore

some reasonable relationship to the Temporary Restraining Order action.

On September 6, 1988, Plaintiff-Appellant filed his Memorandum in Support of Jurisdiction in the Supreme Court of Ohio. The Memorandum was initially dismissed sua sponte October 12, 1988 for allegedly failing to raise a constitutional question. Upon rehearing on December 14, 1988, the sua sponte decision was upheld.

The federal questions sought to be reviewed were illustrated by the Plaintiff-Appellant's Assignments of Error and Arguments pertinent thereto in the Franklin County Court of Appeals on November 19, 1989 and in the Ohio State Supreme Court on September 6, 1989. Therein, the questions of equal protection and due process were cited within the context of the 14th Amendment to the U.S. Constitution as further illustrated herein.

REASON FOR GRANTING WRIT OF CERTIORARI

This Writ should be granted to ensure the constitutional rights of pro se litigants under the 14th Amendment of the U.S. Constitution. Ergo, to afford practicing attorneys absolute immunity from slanderous and malicious statements made during a judicial proceeding while denying that same protection to the pro se litigant is a violation of the equal protection clauses of the State and U.S. Constitutions and is arbitrary and unreasonable.

Equal protection of law implies that all litigants similarly situated may appeal to the Courts for both relief and defense under like conditions with like protection and without discrimination, Sexton v. Barry, 233 F.2d 220, Certiorari denied, 77 S.Ct. 94, 352 U.S. 870, 1 L. Ed.2d 76.

Under the Federal Constitution provision that no state shall deny to any "person" within its jurisdiction "equal protection of

laws", and state constitutional provision that all courts shall be open and every "person" shall have remedy for injury done him...may resort to state courts for redress of injury done him in his...reputation., Const. Ohio Art.1, Section 16, U.S.C.A. Const. Amend. 14, Leiberg v. Vitangeli, 47 N.E. 2d 235, 70 Ohio App. 479, 25 O.O. 211.

As long as laws are applicable to all persons under like circumstances and do not subject individuals to arbitrary exercise of power and operate alike upon all persons similarly situated, cause may satisfy constitutional prohibition against denial of equal protection of the laws, Poindexter v. Willis, 256 N.E. 2d 254, 23 Ohio Misc. 199.

One of the most sensible tests of validity of classification in a statute or law is whether any substantial favor is gained by one class or any greater burden is fastened on the other by reason of the classification, Const. Art. 1 Section 2; Art. 13, Section 4; U.S.C.A.

Const. Amend. 14, Youngstown Sheet & Tube Co. v. City of Youngstown, 108 N.E. 2d 571, 91 Ohio App. 431, 49 O.O. 31.

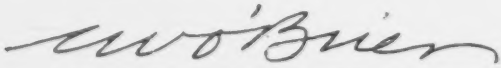
To grant immunity for malicious slander to the class of attorneys to the disadvantage of the class of pro se litigants is arguably a violation of the pro se's entitlement to equal protection of the law and to equal enforcement of his rights under the law. And, whereas the pro se litigant has a constitutional right to self-representation as opposed to any such right possessed by a licensed attorney to represent a client, the aforementioned immunity granted under Ohio law is violative of the 14th Amendment to the U.S. Constitution.

Accordingly, this case involves special and important constitutional reasons for granting this Writ, notwithstanding the public interest involved therein.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ohio Supreme Court, the Franklin County Court of Appeals and the Franklin County Common Pleas Court as the decisions and opinion represent such a significant departure from due process as to call for an exercise of this Court's power of supervision.

Respectfully submitted,



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APPENDIX

THE SUPREME COURT OF OHIO

COLUMBUS

1988 TERM

To wit: December 14, 1989

Charles William O'Brien	:	Case No. 88-1151
Appellant,	:	
v.	:	REHEARING ENTRY
Jacob K. Stein,	:	(Franklin County)
Appellee.	:	

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals Nos. 87AP970 and 87AP1095)

THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

COLUMBUS

1988 TERM

To wit: October 12, 1988

Charles William O'Brien, :

Appellant, : Case No. 88-1151

v. : E N T R Y

Jacob K. Stein, :

Appellee. :

Upon consideration of the motion for an order directing the Court of Appeals for Franklin County to certify its record, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00 paid by Charles W. O'Brien.

THOMAS J. MOYER
Chief Justice

I, Marcie J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoin order was correctly copied from the records of sai Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 12th day of October, 1988.

MARCIA J. MENGEL CLERK

_____ DEPUTY

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Charles William O'Brien	:	
Plaintiff-Appellant	:	Nos. 87AP-970 and 87AP-1095
v.	:	
Jacob K. Stein,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on April 28, 1988, of all appellant's assignments of error in case No. 87AP-970 are overruled, and there being no argument advanced by appellant in case No. 87AP-1095, it is the judgment and order of this court that the judgments of the Franklin County Court of Common Pleas are affirmed.

WHITESIDE, P.J., STRAUSBAUGH & BOWMAN, JJ.

By_____
Judge Dean Strausbaugh

cc: Mr. Charles William O'Brien
Mr. Earle Jay Maiman

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Charles William O'Brien	:	
Plaintiff-Appellant	:	Nos. 87AP-970 and 87AP-1095
v.	:	
Jacob K. Stein,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N
Rendered on April 28, 1988

Mr. CHARLES WILLIAM O'BRIEN, pro se.

MESSRS. PAXTON & SEASONGOOD and EARL JAY MAIMAN, for appellee.

APPEALS from the Franklin County Common Pleas Court.

STRAUSBAUGH, J.

These are appeals by Plaintiff, pro se, two judgments rendered by the Franklin County Court of Common Pleas. The first judgment sustained defendant's motion for relief pursuant to Civ. Ru. 60(B). Also before the court is defendant's motion to dismiss both

appeals.

These matters arise from a suit which was instituted against plaintiff, Charles William O'Brien, by his sister, Beth P. O'Brien, to collect on a certain promissory note. During the course of that case, the trial judge held a hearing in chambers with the parties' attorneys. One of the attorneys was defendant, Jacob K. Stein ("defendant").

Subsequently, on July 2, 1987, plaintiff filed a complaint for slander against defendant alleging that certain of defendant's remarks at the conference were untrue, unwarranted and made with specific intent to improperly influence the pending judicial proceedings. Defendant answered and moved for summary judgment on the basis that even if the allegations of the complaint were taken as true, defendant was entitled to absolute immunity against plaintiff's claims since the statements were made by an attorney in the course of judicial proceedings.

Plaintiff then moved the court to continue the hearing on the summary judgment motion until such time as plaintiff could complete his discovery of defendant. Apparently, in response to plaintiff's previous discovery attempts, defendant had moved for a protective order and an order and quashing the subpoena.

The trial court, on September 16, 1987, granted defendant's motion for summary judgment while overruling all of plaintiff's pending motions. The court specifically found that regardless of plaintiff's ability to obtain discovery, defendant's statements were entitled to absolute immunity since they were made in the course of judicial proceedings. Plaintiff then moved the court for relief from judgment pursuant to Civ. R. 60(B). During the pendency of that motion before the trial court, plaintiff filed an appeal in this court from the summary judgment. On the day plaintiff filed his notice of appeal from the summary judgment, the trial court entered

a judgment overruling plaintiff's Civ. R. 60(B) motion. Plaintiff then commenced an appeal from that judgment as well.

These appeals were consolidated for our review and plaintiff now presents three assignments of error:

> "1. The Trial Court committed prejudicial error by applying an incorrect standard in granting Defendants' Motion for Summary Judgment and dismissing Plaintiff's Complaint, as construing the Affidavit presented by Defendant Stein in a light most favorable to Plaintiff, genuine issues of material fact and questions of law remained.
>
> "2. The Trial Court committed prejudicial error by failing to grant Plaintiff's request for discovery prior to the granting of the Summary Judgment Motion pursuant to Rule 56.

Although plaintiff has also appealed from the judgment overruling his Civ. R. 60(B) motion, the only errors alleged on appeal pertain to the summary judgment. While plaintiff has not separately argued each of his assignments of error, he presents essentially two issues. First, plaintiff contends that the trial court applied an

improper legal standard to the facts of this case. Specifically, plaintiff maintains that absolute immunity is available for an attorney as to statements which are made in the course of judicial proceedings so long as those statements bear some possible relationship to the proceedings. Here, plaintiff argues that defendant's statement to the trial judge in the underlying case had nothing to do with either the complaint or the cross-complaint filed in that case.

Plaintiff's second contention takes issue with the failure of the trial court to grant plaintiff's motion for a continuance on the summary judgment motion pending completion by plaintiff of his discovery. Since plaintiff's discovery was directed at defendant's statement to the trial judge, plaintiff argues that the trial court abused its discretion when it denied his motion for a continuance.

Turning first to defendant's motion to dismiss, defendant maintains that because

plaintiff has made reference in his appellate brief to issues not in the record and because plaintiff has failed to append to his brief pertinent material, pursuant to Loc. R. 6(F) of the Tenth District Court of Appeals, the Court should dismiss plaintiff's appeal from the summary judgment. We disagree.

Although defendant is correct that this court has the discretion to dismiss plaintiff's appeal pursuant to Loc. R. 8(E) of the Tenth District Court of Appeals, we find that plaintiff's failure to technically comply with Loc. R. 6(F) of this court is not fatal to his appeal. All of the documents relevant to the disposition of this appeal are contained in the record. As such, dismissal of this appeal for such a technical reason would be inconsistent with the policy of deciding cases on their merits. Cf. DeHart v. Aetna Life Ins. Co. (1982), 69 Ohio St. 2d 189.

As to the merits of this appeal, an oral statement by an attorney to a judge has

absolute immunity to a slander action when those statements are made while representing a a client, so long as the defamatory matter bears some reasonable relation to the judicial proceeding in which it is uttered. Cf. Surace v. Wuliger (1986), 25 Ohio St. 3d 229; Justice v. Mowery (1980), 69 Ohio App. 2d 75. The issue is not whether the allegation is true or false, but rather whether the statement bears some reasonable relationship to the judicial proceeding from which is emanated. Erie County Farmers Ins. Co. v. Crecelius (1930), 122 Ohio St. 210, 213-214; Surace, supra, at 235, fn. 2. Whether the alleged defamatory statement is to be accorded privileged status within the context of a particular case is a question of law alone. Mauk v. Brundage (1903), 68 Ohio St. 89, paragraph two of the syllabus; Surace, supra, at 234.

Given this state of the law, it is clear that plaintiff's invocation of the Civ. R. 56(C)

standard for rendering summary judgments misses the mark. Whether Mr. Stein's statement to the judge bore some reasonable relation to the pending suit was solely a question of law. As such, there was no inference to be drawn regarding defendant's statement.

Here, the alleged statement was made during a pretrial conference to the judge in response to a question regarding the viability of a settlement. Irrespective of the truth of the statement, it is clear that it was made in the course of Mr. Stein's representation of his client. Given the uncontroverted evidence that the statement was offered in response to a question posed by the judge, there is no question but that the statement was absolutely privileged. Although plaintiff seems to indicate that his verified complaint put into issue the purpose of the pretrial conference, our review of that complaint fails to substantiate that position. Even assuming, as plaintiff urges, that the purpose of the pretrial

conference was solely to aid the trial judge in his understanding of the issues prior to the hearing of plaintiff's motion for a temporary restraining order, it is equally clear that the alleged statement would have some reasonable relationship to that hear. Since setting of a bond is a necessary adjunct to a Civ. R. 65(A) proceeding, the statement is quite relevant to the amount of the bond. See Civ. R. 65(C). Based on the foregoing, plaintiff's first assignment of error is overruled.

Plaintiff, by way of his second and third assignments of error, maintains that the trial court erred when it failed to grant his motion for a continuance in order to obtain discovery from defendant. Whatever merit such argument may have otherwise, it has no application here. As previously noted, since the resolution of this question does not turn on such factual questions as Mr. Stein's intent, purpose or feelings toward plaintiff, the trial court

correctly concluded that no amount of discovery in this respect would allow plaintiff to prevail. Thus, plaintiff's second and third assignments of error are overruled.

Having overruled plaintiff's three assignments of error in case No. 87AP-970 and there being no argument advanced by plaintiff in support of his appeal in case No. 87AO-1095, the judgments of the court of common pleas are affirmed.

Judgments affirmed.

WHITESIDE, P.J. and BOWMAN, J., concur

IN THE COURT OF COMMON PLEAS

FRANKLIN COUNTY, OHIO

CHARLES WILLIAM O'BRIEN, :

Plaintiff, :

-vs- : Case No. 87CV-07-4158

JACOB K. STEIN, et al., : Judge Fais

Defendants. :

D E C I S I O N

Rendered this 16 day of September, 1987.

Fais, J.

Several motions are pending before this Court. Plaintiff has filed a complaint, an amended complaint, a revised amended complaint and a second revised amended complaint. Plaintiff has also requested certain discovery from defendant Stein as well as sanctions. Motions to strike and replies in abundance have also been filed. Defendants have moved the Court for summary judgment and for amended summary judgment filed August 17, 1987. The request for extension was made on August 31, 1987. The hearing date scheduled for the summary judgment

motion by this Court's Decision was September 11, 1987

Upon careful review of plaintiff's complaint the Court must sustain defendants' motion for summary judgment. Although Plaintiff has requested an extension of time to reply which has not been granted, the basis for the extension is a lack of discovery. Upon review of the discovery requested the Court can find nothing which would rehabilitate the defective claims filed by plaintiff.

Plaintiff has asserted six claims in the most recent complaint. All of those claims arise from plaintiff's claim of slanderous remarks said to have been uttered on June 30, 1987 in Chambers 6-D in a matter pending before Judge Tommy Thompson. As correctly pointed out by defendants, the holding of Surace vs. Wuliger (1986) 25 Oh St. 30D 229 and Justice v. Mowery (1980) 69 Ohio App. 2d 75 clearly enunciates that an absolute immunity from slander or liable attached to statements made

in the course of litigation if possibly bearing a relationship to the proceedings. The underlying dispute in 87CV-06-3937 pending before Judge Thompson revolves around O'Brien family members and jointly owned bowling alleys. As pointed out in Justice vs. Mowery, supra, the intent of an attorney in making statements claimed to be slanderous is of no importance. Malice or ill will is not a factor. With this premise in mind a review of plaintiff's complaint mandates the conclusion that the complaint must be DISMISSED.

Plaintiff's first claim is one for slander. Defendant's statements were made under privilege and were clearly related to the proceeding in which they were made. Plaintiff's second claim is essentially a re-statement of the first. Plaintiff's third claim incorporates elements of acts which may be criminal but are not subject to private civil address. Plaintiff's fourth claim is one to be brought before the appropriate Bar Association or

Supreme Court Disciplinary Council. Plaintiff's fifth claim is not easily discernable but since based upon statements of June 30, 1987 to which an absolute privilege attaches, those statements to not rise to creating an actionable claim. If as plaintiff contends his counsel will become a witness with respect to those statements the interference with contract claimed by plaintiff to exist is not one that this Court can find justiciable. Plaintiff's sixth claim is one of agency and in light of the previous findings of this Court the Court must find that the sixth claim is not actionable.

The court upon due consideration finds that the defendants' motion for summary judgment should be and is hereby SUSTAINED. The other multivarious motions are rendered moot by this Decision. Counsel for defendants shall prepare a judgment entry and submit the same to this Court within ten (10) days of this Decision.

G.W. FAIS, JUDGE

Copies to:

Charles Wm. O'Brien

Attorney for Plaintiff

Earle Jay Maiman

Attorney for Defendants

CERTIFICATE OF SERVICE

The undersigned, Charles William O'Brien, pursuant to Rule 28 of the Supreme Court of the United States hereby certifies that three copies of the Petitioner's for a Writ of Certiorari was mailed this 17th day of April, 1989 to Earle Jay Maiman, Paxton & Seasongood, Attorney for Respondent, 1700 Central Trust Tower, Cincinnati, Ohio 45202, by regular first class U.S. mail, postage pre-paid.

AFFIDAVIT

STATE OF OHIO

SS:

COUNTY OF FRANKLIN

Charles William O'Brien, being duly cautioned and sworn, states that the above certificate of service is correct in every way. Further affiant sayeth naught.

Sworn to and subscribed in my presence, this 17th day of April, 1989.

Charles William O'Brien

Notary Public

NO. 88-1713

FILED
JUL 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

CHARLES WILLIAM O'BRIEN,

Petitioner

v.

JACOB K. STEIN AND
PAXTON & SEASONGOOD, L.P.A.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

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(513) 352-6700

Counsel for Respondent

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1. O'Brien did not raise the question which he presents to the Supreme Court of the United States in the Common Pleas Court or in the Court of Appeals. He did not properly raise the question in the Supreme Court of Ohio.	7
2. O'Brien's argument is hypothetical in nature and has no relation to the facts of this case since O'Brien was not a pro se litigant at the time the allegedly slanderous remarks were made.	11
3. O'Brien was not denied Equal Protection of the Law under the Fourteenth Amendment to the U.S. Constitution, because no Ohio state Court has ever held that a pro se litigant is not entitled to the same immunity	

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as an attorney for comments made during and relating to judicial proceedings. 13

4. Even if pro se litigants were not entitled to absolute immunity for slanderous comments made during and related to judicial proceedings while attorneys were entitled to immunity, a difference in treatment would not constitute a violation of the Equal Protection clause because there are valid reasons for a difference in treatment 15

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STATEMENT OF THE CASE

O'BRIEN I

This petition arises out of the second of two related cases originally filed in the Court of Common Pleas, Franklin County, Ohio. In the first case (O'Brien I), Petitioner Charles William O'Brien (O'Brien) was a defendant. Respondent Jacob K. Stein (Stein) represented the plaintiffs. At that time, Stein was a shareholder in Respondent Paxton & Seasongood, L.P.A. (Paxton & Seasongood). Stein's clients were the majority shareholders of a corporation of which O'Brien was an officer and minority shareholder. In O'Brien I, Stein's clients were successful in having O'Brien removed as an officer of the corporation. At all relevant times in O'Brien I, O'Brien was represented by counsel and was not a pro se litigant.

As part of the proceedings in O'Brien I, a hearing was scheduled on a

Motion for Temporary Restraining Order. The trial judge asked that counsel for all parties meet with him in chambers to discuss the possibility of settling the case. A conference was held which was attended by the trial judge, two attorneys representing O'Brien, Stein, and another attorney from Stein's office.

During the course of this conference, the trial judge asked counsel to explain why the parties could not resolve their differences. In response to this question, Stein explained that all of the parties were members of the same family and that bitter antagonisms and emotions existed between them. Stein allegedly stated that his clients had reported to him that O'Brien was so adamant about staying in control of the business that he had threatened to burn it down rather than to allow control to be transferred.

O'BRIEN II

On July 2, 1987, O'Brien filed O'Brien II which was a complaint for slander against Stein and Paxton & Seasongood. In this suit, he claimed that Stein's comments at the conference in O'Brien I about O'Brien's threat to burn down the business were untrue and malicious.

On July 8, 1987, in O'Brien II, Stein filed an Answer and a Motion for Summary Judgment. In the Motion for Summary Judgment in O'Brien II Stein asserted his absolute immunity from a suit for slander resulting from statements made in a judicial proceeding. O'Brien thereafter commenced discovery, but upon Stein's objection thereto, the court held that the issue raised by Stein's Motion for Summary Judgment was a legal one upon which there was no factual dispute and so, therefore, there was no need for discovery.

On September 16, 1987, the trial court granted Stein's Motion for Summary Judgment

on the basis that Stein's statements in court were privileged. O'Brien did not assert in the trial court that granting judgment to Stein would in any way infringe upon O'Brien's equal protection rights under the Fourteenth Amendment to the U.S. Constitution.

On November 17, 1987, O'Brien filed a Notice of Appeal. The case was extensively briefed in the Court of Appeals. At no time did O'Brien raise the issue of equal protection. He simply argued that Stein's remarks should not be privileged. The Court of Appeals affirmed the trial court.

On June 27, 1988, O'Brien filed a Notice of Appeal to the Supreme Court of Ohio in which, for the first time, an equal protection argument was advanced. On September 6, 1988, O'Brien filed a Memorandum in Support of Jurisdiction in the Supreme Court of Ohio. On October 12, 1988, the Supreme Court of Ohio sua sponte dismissed O'Brien's attempted appeal

because of a failure to raise a constitutional question, and on December 14, 1988, the Supreme Court of Ohio reaffirmed this decision.

SUMMARY OF THE ARGUMENT

In the petition filed with this Court, O'Brien raises an issue not properly presented by him to any Ohio state Court, and not decided by any of the Ohio state Courts below. This Court should not consider this issue for the first time on this appeal.

O'Brien was not a pro se litigant at the time the allegedly slanderous remarks were made. Rather, he was represented by two attorneys. These attorneys enjoyed the same immunity as Stein. The facts of this case do not give rise to the issue presented to this Court by O'Brien.

Even if O'Brien had been a pro se litigant at the time of the allegedly slanderous remark, he was not denied equal

protection of the law because no Ohio state Court has ever held that a pro se litigant is not entitled to the same immunity as a practicing attorney. On the contrary, Ohio courts have recognized that this immunity extends to others, and not only to practicing attorneys.

Even if pro se litigants were not entitled to absolute immunity for slanderous comments made during judicial proceedings, and attorneys were entitled to such immunity, there are valid reasons for a difference in treatment. Pro se litigants, unlike attorneys, are not subject to the Code of Professional Responsibility which requires attorneys to maintain the integrity of the legal profession (Canon 1), to exercise independent professional judgment (Canon 5), and to represent a client within the bounds of the law (Canon 7). Attorneys, unlike pro se litigants, are subject to discipline for failing to observe these

obligations. Moreover, attorneys do not possess the emotional or personal interest of a pro se litigant.

REASONS WHY THE PETITION SHOULD BE DENIED

1. O'Brien did not raise the question which he presents to the Supreme Court of the United States in the Common Pleas Court or in the Court of Appeals. He did not properly raise the question in the Supreme Court of Ohio.

The sole question presented by O'Brien's petition is whether the equal protection clause of the Fourteenth Amendment to the U.S. Constitution would require that the immunity granted attorneys under Ohio law, relating to comments which they make in court, be extended to pro se litigants.

The Ohio Rules of Civil Procedure and the Ohio Appellate Rules are substantially similar to the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. Under these rules, a party is required to set forth his position

at a relatively early stage in the proceeding in order to preserve it. For example, Ohio Civil Rule 8 (like the comparable Federal Rule) provides for a short and plain statement of the claim. Ohio Civil Rule 56 (like the comparable Federal Rule) provides that a party against whom a Motion for Summary Judgment is filed must come forward with facts or legal argument in support of his position. He may not rest upon the pleadings. O'Brien did not raise the equal protection argument which he is advancing in this Court in either his Common Pleas Court complaint (or the amendments thereto) or in the summary judgment proceedings.

The Ohio Rules of Appellate Procedure are quite similar to the Federal Rules of Appellate Procedure. Ohio Appellate Rule 12(A) provides in substance that an appeal shall be determined on the assignments of error set forth in the briefs (Ohio Appellate Rule 16), the record on appeal

(Ohio Appellate Rule 9), and on the oral arguments of the parties or their counsel (Ohio Appellate Rule 21). These rules required O'Brien to assert his equal protection argument if he wanted to have it considered by the Ohio Appellate Court. O'Brien did not in his briefs, in the record on appeal, or in his oral argument in the Court of Appeals make any argument related to equal protection. The Court of Appeals affirmed the trial court.

The Supreme Court of the United States has repeatedly held that it will not consider a claim unless it has been properly raised and considered below. Hill v. California, 401 U.S. 797, 805 (1971). As pointed out in Cardinale v. Louisiana, 394 U.S. 437 (1969), there are sound reasons for this rule, including the importance of allowing lower courts the opportunity to interpret state law in such a way as to avoid constitutional questions. Id. at 439.

The first and only time in the state court that O'Brien referenced the equal protection clause of the Fourteenth Amendment to the U.S. Constitution was in his Notice of Appeal to the Supreme Court of Ohio. His attempt to deal with the issue at that late stage of the proceedings was ineffectual because "[T]he fundamental rule is that an appellate court will not consider any error which could have been brought to the trial court's attention, and hence avoided or otherwise corrected." Schade v. Carnegie Body Co., 70 Ohio St. 2d 207, 210, 436 N.E.2d 1001, 1003 (1982).

This Court has held that when "[T]he highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576, 582 (1969). Since the Ohio Supreme Court did not pass

upon the equal protection question, review by this Court is not warranted.

This Court has consistently stated that it will not decide a federal question raised for the first time on a review of the state court decisions. Cardinale v. Louisiana, 394 U.S. 437 (1969); Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc., 360 U.S. 334 (1959).

In light of O'Brien's failure properly to raise the issue he presents to this Court in the state court proceedings, the petition should be dismissed.

2. O'Brien's argument is hypothetical in nature and has no relation to the facts of this case since O'Brien was not a pro se litigant at the time the allegedly slanderous remarks were made.

O'Brien's argument focuses on the alleged disparity of treatment between a pro se litigant and counsel for the opposing party during a status conference in the trial court. What O'Brien has

failed to point out to this Court is that during the conference he was represented by counsel. The only persons present at the conference were Stein, an attorney associated with Stein, O'Brien's counsel, and the trial judge. Thus, O'Brien's argument concerning the denial of equal protection to a pro se litigant is hypothetical in nature and has nothing to do with the facts of this case. The Supreme Court has repeatedly held that it will not deal with issues not presented by the facts of the case before it. Princeton University v. Schmid, 455 U.S. 100, 102 (1982); Sierra Club v. Morton, 405 U.S. 727, 732-733 (1972); Flast v. Cohen, 392 U.S. 83, 100 (1968).

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3. O'Brien was not denied Equal Protection of the Law under the Fourteenth Amendment to the U.S. Constitution, because no Ohio State Court has ever held that a pro se litigant is not entitled to the same immunity as an attorney for comments made during and relating to judicial proceedings.

Under Ohio law, an attorney has absolute immunity from a libel and slander action for statements made while representing a client in the course of litigation, either in pleadings, briefs, or in oral statements to the judge and jury, provided the defamatory matter bears some possible relation to the judicial proceeding. Simmons v. Climaco, 30 Ohio App. 3d 225, 227, 507 N.E.2d 465, 467 (1986). This immunity has never been held inapplicable to pro se litigants. See Surace v. Wuliger, 25 Ohio St. 3d 229, 495 N.E.2d 939 (1986); Justice v. Mowery, 69 Ohio App. 2d 75, 430 N.E.2d 960 (1980); Erie County Farmers' Insurance Co. v. Crecelius, 122 Ohio St. 210, 171 N.E. 97 (1930). On the contrary, as early as 1909,

Ohio courts recognized that this immunity extended to pro se litigants. Rudin v. Fauver, 30 Ohio C.C. 315 (1909). The issue before the Rudin court was "[W]hether all statements made by attorneys and others in court, in relation to matters in litigation therein, are the subject of an absolute or only a qualified privilege." Id. (emphasis added). The court held that an absolute immunity attached. Id. at 316.

The Ohio state courts did not hold that O'Brien lacked immunity from suit for slanderous statements relating to the litigation. The Ohio state courts held that Stein was also entitled to such immunity. Thus, there is no finding in the opinions of the Ohio state Courts that O'Brien is being subjected to different standards than Stein.

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4. Even if pro se litigants were not entitled to absolute immunity for slanderous comments made during and related to judicial proceedings while attorneys were entitled to immunity, a difference in treatment would not constitute a violation of the Equal Protection clause because there are valid reasons for a difference in treatment.

The rule of absolute immunity originated from the belief that if attorneys were not at liberty to speak freely in court, then they would not zealously defend their clients for fear of future suits for libel and slander. Erie County Farmer's Insurance Co. v. Crecelius, 122 Ohio St. 210, 214-215, 171 N.E. 97, 98 (1930). This belief conforms to the basic goal of our judicial system -- to promote the free and open discussion of all aspects of a case in order to assist the court in determining the truth. Surace v. Wuliger, 25 Ohio St. 3d 229, 235, 495 N.E.2d 939, 944 (1986).

Attorneys, unlike pro se litigants, are subject to the Code of Professional

Responsibility, which requires them zealously to represent their clients. Id. at 235, 495 N.E.2d at 944. Failure to do so can result in severe sanctions being assessed against the defaulting attorney. Moreover, attorneys, again unlike pro se litigants, are under an obligation to maintain the integrity of the legal profession, to exercise independent professional judgment, and to represent their clients within the bounds of the law. These obligations (and the disciplinary procedures for enforcing them) alone are ample justification for treating attorneys differently than non-lawyers with respect to the scope of immunity for statements made in court.

It is also worth noting that while attorneys do have an interest at stake in the outcome of the judicial proceedings, they do not possess the emotional or personal interest in the outcome that a pro se litigant has. Therefore, their

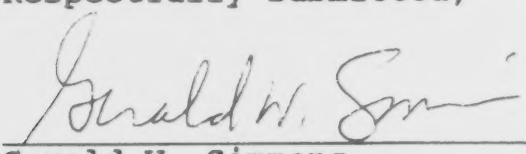
statements are less likely to be tainted with ill will than a pro se litigant's statements.

CONCLUSION

The petition for a writ of certiorari should be denied because: (1) O'Brien has not properly raised in the Ohio state Courts the issue he seeks to present here; (2) the issue presented is totally hypothetical since O'Brien was not a pro se litigant at the time of the alleged slander; (3) Ohio law simply does not condone the disparate treatment of pro se litigants which O'Brien hypothesizes; and (4) disparate treatment if it existed could well be justified based upon the obligations imposed upon counsel (and not

upon pro se litigants) by the Ohio Code of Professional Responsibility.

Respectfully submitted,



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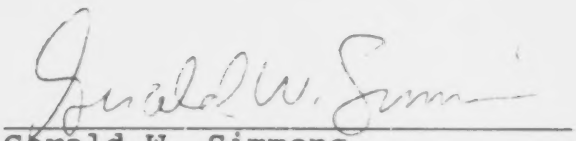
CERTIFICATE OF SERVICE

I hereby certify that three copies of the Respondents' Brief in Opposition to the Petition for Certiorari has been served upon Charles William O'Brien, c/o National Heritage, P.O. Box 8369, Columbus, Ohio 43201, by regular first-class U.S. mail, postage prepaid on this 12th day of July, 1989.



Gerald W. Simmons